



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

**JUN 28 2012**

The Honorable Fred Upton  
Chairman, Committee on Energy and Commerce  
U.S. House of Representatives  
Washington, D.C. 20515

Dear Chairman Upton:

Thank you for your May 24, 2012 letter, to Administrator Lisa Jackson, co-signed by your colleagues, regarding the United States Environmental Protection Agency's administration of the Renewable Fuels Standard (RFS) program and Renewable Identification Number (RIN) fraud. We appreciate the Committee's questions and concerns and we have been actively following up on addressing those concerns.


The Agency is committed to meeting the statutory goals of the RFS. Since our February 23, 2012, correspondence with the Committee, we have been meeting and corresponding with industry stakeholders to discuss various approaches to improve the RFS program. In addition, over the last several months, a number of companies have started to provide RIN verification services to market participants. The Agency is continuing its dialogue with representatives from the affected and interested industry sectors to discuss a number of options currently under consideration, including the concept of a third-party RIN certification process.


EPA staff also met with Committee staff on June 13, 2012, in regard to many of the concerns raised in your letter and the options under consideration. The Agency is very cognizant of the concerns regarding the recent enforcement actions, and we are making every effort to address such concerns and to develop constructive and effective solutions where necessary.

Initial responses to your questions are enclosed, and as noted, the additional information and documents will be provided as soon as practicable.

Again, thank you for your letter. If you have further questions, please contact us or your staff may call Carolyn Levine in EPA's Office of Intergovernmental and Congressional Relations at 202-564-1859.

Sincerely,

  
Cynthia Giles  
Assistant Administrator  
Office of Enforcement and Compliance Assurance

  
Gina McCarthy  
Assistant Administrator  
Office of Air and Radiation

Enclosures

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Enclosure

**EPA Responses to May 24, 2012 letter**

1. *Please provide a detailed chronology of EPA's actions with regard to Green Diesel, including a description of the Agency's communication of these actions to the regulated community, including, but not limited to, (i) when and how EPA first learned that Green Diesel's RINs may be invalid, and (ii) when and how the Agency first notified the purchasers that the Agency believed that the Green Diesel RINs were invalid.*

While EPA's actions regarding Green Diesel involve matters currently under active investigation and/or preparation for enforcement action, we are providing responses to the Committee to address your interest in understanding EPA's actions while not disclosing information that might adversely affect a pending enforcement action, overall enforcement policy, or the rights of individuals.

The RFS 2 program began on July 1, 2010. On July 16, 2010, Green Diesel began generating RINs under the RFS 2 program based on information EPA received. On July 18, 2011, EPA's Office of Civil Enforcement sent a letter to Green Diesel that informed the company that the EPA intended to conduct an inspection and identified the types of documents that the EPA intended to review. On August 3<sup>rd</sup> and 4<sup>th</sup>, 2011, the EPA's Office of Civil Enforcement (OCE) conducted an inspection of Green Diesel.

Shortly after the inspection of Green Diesel was conducted, OCE informed EPA's Office of Criminal Enforcement, Forensics and Training (OCEFT) about information obtained during the inspection. Further investigation proceeded in accordance with EPA's September 24, 2007, Parallel Proceedings Policy.

On December 7, 2011, OCE sent an information request to Green Diesel under the authority of Section 114 of the Clean Air Act. Green Diesel responded to this information request through three submissions received by EPA on January 13, 2012, January 16, 2012 and January 23, 2012.

On April 30, 2012, the EPA issued a Notice of Violation to Green Diesel alleging that all of the RFS 2 RINs that it generated from July 16, 2010 through July 15, 2011 were invalid. The NOV alleges the company generated more than 60 million invalid biomass-based diesel RINs without producing any qualifying renewable fuel and transferred the majority of these invalid RINs to others. As soon as the EPA issued this NOV, the Agency 1) posted the NOV on its website at: <http://www.epa.gov/compliance/civil/caa/fuel-novs.html>, 2) called all obligated parties that used Green Diesel RINs to inform them that the Agency issued an NOV and to direct them to the EPA's Interim Enforcement Response Policy (IERP), and 3) sent an email to the obligated parties with a link to the EPA's website where the NOV and IERP is posted.

The EPA's Office of Transportation and Air Quality followed up with each obligated party that used Green Diesel RINs, and provided them with instructions regarding how to remove these RINs from their annual compliance reports and resubmit corrected reports. The EPA also

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contacted all parties who owned, but did not use, Green Diesel RINs, and informed these parties that the Agency issue an NOV alleging that Green Diesel generated invalid RINs.

- a. *Did EPA know of the potential invalidity of the Green Diesel RINs prior to the April 20, 2012 settlement agreement with 31 companies?*

Yes.

- b. *If so, why did EPA wait to issue a Notice of Violation against Green Diesel until 10 days after announcing the settlement agreements with respect to the invalid RINs identified from Clean Green and Absolute Fuels?*

The timing of the Green Diesel Notice of Violation (NOV) was based solely on the facts of EPA's investigation of Green Diesel and the implementation of the EPA's Parallel Proceedings Policy, and was independent of other enforcement actions, including the announcement of the Clean Green and Absolute settlements. The EPA advances each of its investigations according to the facts of that case. In our Interim Enforcement Response Policy, the EPA explains that it intends to notify the regulated community that it has alleged that RINs are invalid "when the agency has developed what it determines is sufficient proof to warrant a public allegation and determined that such notification will not unduly impair ongoing investigations." The Agency also needs to balance the desire for quick action with the responsibility to protect the rights of the parties under investigation. Prior to issuing the Green Diesel NOV, the EPA (1) obtained sufficient evidence to support the allegations, and (2) worked with OCEFT and the United States Department of Justice to ensure that the issuance of the NOV would be consistent with EPA's Parallel Proceedings Policy.

2. *Please provide any registration and/or re-registration applications and accompanying materials submitted by Green Diesel, Absolute Fuels, or Clean Green and any related companies. Please describe EPA's review and approval process of any such applications. Were engineering reviews and site visits by independent third parties conducted, as required by 40 C.F.R. 80.1450, before the Agency approved registration applications for any of these companies? Please provide all documents that were submitted to EPA to satisfy these regulatory requirements and all documents relating to such reviews and visits. Did these companies submit any attestation reports, pursuant to 40 C.F.R. 80.1464, for the years 2010 and 2011? Please provide all such reports.*

We are collecting documents responsive to question 2 and will provide these to the Committee, together with responses to the questions, as soon as practicable. Please note that these documents will contain confidential business information.

3. *Under the EPA Moderated Transaction System (EMTS), it is possible for participants to block transactions with certain RIN producers within the system from which they choose not to purchase RINs. Please provide any registration and/or re-registration applications, including all documents submitted to EPA as part of these applications, for the ten most-frequently blocked*

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*registrants on EMTS as of the date of this letter. For each registrant, please describe EPA's applications review and approval process.*

We are collecting documents responsive to question 3 and will provide these to the Committee, together with responses to the questions, as soon as practicable. Please note that these documents will contain confidential business information.

4. *The Committee has been informed that there may be additional fraudulent RINs currently in the marketplace. Please describe EPA's plan for managing and investigating the possibility of additional invalid RINs within the RFS program.*

- a. *Are there presently participants in the RFS program under investigation for invalid, fraudulent, or otherwise improper RINs, regardless of whether the investigation is preliminary, partial or complete?*

Yes. EPA's Criminal Investigation Division (CID) is investigating alleged fraudulent RIN violations in conjunction with other federal law enforcement partners.

- b. *If so, how many?*

EPA currently has open criminal investigations involving potentially fraudulent RINs. One of these – Clean Green – has been formally charged, and its President, Rodney Hailey was convicted on all counts during his recently concluded trial in U.S. District Court in Maryland.

5. *What regulatory approaches would the Agency be able to implement so that an obligated party operating in good faith can avoid penalties and/or NOVs under the RFS program as a result of using fraudulently generated RINs? Is a regulatory change necessary? Why or why not?*

EPA is meeting with a wide range of industry stakeholders to hear their suggestions regarding potential regulatory changes involving good faith purchasers, and we look forward to a solution that improves the RFS program and effectively implements statutory requirements.

The Agency understands the concerns that obligated parties have with the potential liability of good faith purchasers who submit invalid RINs to fulfill their annual renewable fuel obligation. As an initial response to those concerns, the Agency has implemented an Interim Enforcement Response Policy (IERP) to address violations arising from the use of invalid RINs. The IERP is described in more detail in the response to question 9, below.

6. *Was EPA statutorily obligated to impose strict liability for RIN compliance or is this a product of EPA's policy choice(s)? Provide all documents relating to EPA's decision to impose strict liability for RIN compliance.*

EPA is evaluating its current policy and discussing alternative policy choices with a wide range of stakeholders. To date, EPA has strived to develop an enforcement system for the RFS



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program that allows the Agency to meet its statutory mandate. The Clean Air Act requires EPA to promulgate regulations to “ensure” that transportation fuel sold or introduced into commerce in the United States contains a minimum volume of renewable fuel, advanced biofuel, cellulosic biofuel, and biomass-based diesel on an average annual basis. 42 U.S.C. §7545(o)(2)(A)(i). The Act further requires that these regulations contain compliance provisions to ensure that the annual minimum RFS goal is met. 42 U.S.C. §7545(o)(2)(A)(iii).

While the statute does not specify a particular legal standard of responsibility by name, the annual RFS goals are met by obtaining compliance from obligated fuel producers and importers. If obligated parties fall short of their renewable fuel obligations, the Agency falls short of its statutory obligation to ensure the minimum RFS goals are met.

The EPA's decision to impose strict liability for RIN compliance is explained in the Preamble to the RFS1 Rule, Regulation of Fuels and Fuel Additives: Renewable Fuel Standard Program; Final Rule, 72 Fed. Reg. 23900-23993 (May 1, 2007); the Preamble to the RFS 2 Rule, Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program, 75 Fed. Reg. 14670-14863 (March 26, 2010); and the Summary and Analysis of Comments for the RFS 2 Rule, February 2010, EPA-420-R-10-003, 4-42. We are providing the relevant excerpts from these documents as separate attachments to this letter.

7. *How, if at all, does EPA believe that the “buyer beware” approach helps to ensure reliability of the RINs purchased in the renewable fuels marketplace in the instance of fuel that is produced but is perhaps off-specification? If a RIN purchaser buys RINs from a broker, how can that purchaser obtain the necessary due diligence information regarding the fuel supplier? The RFS program allows separation of RINs from the gallon of biofuel. As a consequence, might a RIN purchaser that exercises due diligence be unable to discern whether a RIN was properly generated and appropriately coded in EMTS?*

The Agency is meeting with a wide range of industry stakeholders to hear suggestions regarding potential regulatory changes to the RFS program, and is committed to working to improve the system and make changes as appropriate to help ensure that the goals of the RFS program are met.

As the RFS program was being developed, industry expressed the need for the flexibility to separate RINs from actual fuel volumes so the obligated parties could comply without necessarily directly blending the renewable fuel into their product. The “buyer beware” approach was based on EPA’s belief at the outset of the program that the participants in the RIN market, those with the most control and experience, were in the best position to assess particular RINs and gauge their level of risk without EPA intervention.

Recently, EPA has been meeting with obligated parties and industry stakeholders to discuss how the system is working, and how it could be improved. In light of these meetings and recent developments, EPA understands that a reassessment of this approach may be needed. As stated in the preamble to the RFS 2 regulations, “[w]hile we believe that EMTS will simplify and reduce burdens on the regulated community, it is important to point out that EMTS is strictly a

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RIN tracking and managing tool designed to facilitate reporting under the Renewable Fuel Standard program.” 75 Fed. Reg. 14731-1432 (March 26, 2010). Therefore, while EMTS cannot presently guarantee validity of a RIN, each RIN recorded in EMTS does contain information that may help regulated parties evaluate whether the RIN is valid. This information includes, but is not limited to, the name of the company that generated the RIN, the location of the facility where the RIN was generated, and the date that the RIN was generated.

8. *In EPA's February 23, 2012, response to the Committee, the Agency invoked low-sulfur fuels as an example of industry participants engaging in due diligence to ensure that the sulfur tolerances of each batch are met. But physical fuel can be inspected and tested by each buyer, while separated RINs cannot. Given that RINs are essentially a currency created under the supervision of EPA, is there an additional obligation on the part of the Agency to ensure validity of the RINs?*

Recognizing the strong desire of all parties to find a better approach for ensuring RIN validity, EPA is continuing to meet with a wide range of industry stakeholders on this subject. To date, those meetings have focused on identifying which aspects of the current system are working and which aspects can be improved. The Agency is committed to working to improve the system and to make changes as appropriate to help ensure the goals of the RFS program are met.

9. *Why has EPA moved forward with enforcement actions against good faith purchasers? Does EPA make any distinction between good faith and bad faith purchasers?*

The purpose of the renewable fuel standard program is to reduce the nation's dependence on foreign oil, help grow the nation's renewable energy industry and achieve significant greenhouse gas emissions reductions. When RINs are used that do not represent actual renewable fuel, regardless of a company's good faith belief that the RINs were valid, it undermines Congress' goals in creating the RFS program, creates market uncertainty and is a violation of the standard. To help restore certainty in the market and ensure that the goals of Congress are met, the EPA has implemented an Interim Enforcement Response Policy (IERP) to resolve violations with arising from the use of invalid 2010 and 2011 Biomass-based diesel RINs.

The IERP does not explicitly refer to “good faith purchasers” of RINs. However, in light of the widespread failure of obligated parties to conduct adequate due diligence in the relatively new RIN market, the IERP implements a streamlined approach for parties who used invalid RINs to correct violations and provides a fair and efficient mechanism for the prompt resolution of a party's liability for those violations. The IERP allows obligated parties to resolve their violations by paying modest civil penalties, and includes penalty caps to limit the penalty exposure for parties who unknowingly used invalid RINs. The IERP applies to all parties if 1) at the time they used the RINs, they had not yet learned that the RINs were invalid, and 2) they have implemented the remedial actions identified in the IERP.

As noted above, the EPA continues to have productive discussions with industry stakeholders to identify options for improving the current approach of assuring RIN validity.

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*a. Under what circumstances would EPA decide not to bring an enforcement action?*

There are many factors taken into consideration before EPA initiates an enforcement action. EPA intends to continue to bring enforcement actions against renewable fuel producers and importers who generate invalid RINs. The EPA also intends to resolve violations arising from the use of invalid 2010 and 2011 biomass-based diesel RINs under the IERP. The EPA intends to informally reach out to parties that used invalid RINs to provide them with an opportunity to amicably resolve their violations in accordance with the IERP and without bringing an enforcement action, and if requested, without issuing a Notice of Violation.

*b. On what basis will EPA decide to bring or not bring an enforcement action against a purchaser in the future?*

The EPA expects that regulated parties will take steps to ensure that the RINs that they are purchasing are valid. If a party violates the RFS regulations by transferring or using an invalid RIN, the EPA will consider all of the circumstances surrounding the violation to determine the appropriate response, including whether the invalid RINs have been replaced with valid RINs and whether the party acted in good faith and conducted an appropriate level of due diligence.

Although the regulations establish strict liability for the use or transfer of invalid RINs, the EPA routinely prioritizes its enforcement resources based upon many factors including the culpability of parties who have violated the regulations, the seriousness of the violation and the need for effecting deterrence of specific behaviors. EPA has used criminal enforcement authorities to address what are alleged to be significant violations of the RFS rules relating to the generation of RINs. Property has been seized from alleged violators under these authorities. In contrast, no enforcement actions have been filed against parties that used invalid RINs. In fact, the EPA has resolved almost all outstanding issues with the parties that used the invalid RINs on the basis of 10 cents per RIN, as opposed to the statutory maximum penalty of \$37,500, per violation, per day. These matters were resolved without the filing of an enforcement action and without any admission of wrongdoing on the part of the settling party.

In general, participants in the biodiesel market have initiated substantial efforts to investigate and otherwise ensure the validity of RINs purchased subsequent to the announcement of the recent enforcement actions relating to fraudulent RINs. The Agency has also reached out to the participants to continue discussions that began last fall on ways to potentially improve the RFS program, and RIN validity in particular. While every enforcement decision is dependent upon the facts of a particular violation, the EPA would consider in deciding whether to take enforcement action all actions taken by a RIN user or transferor to verify the validity of those RINs.